

¹ See *Horner v. Amity Health, LLC*, No. 1,066,998, 2014 WL 889878 (Kan. WCAB Feb. 17, 2014).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 14, 2013, Preliminary Hearing and the exhibits, and the transcript of the April 10, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant did not suffer a personal injury by accident or repetitive trauma in the course and scope of her employment, and claimant's injuries arose from activities of daily living or from a personal condition of claimant. Further, respondent asserts claimant filed this claim as a retaliation for employment issues.

Claimant contends the ALJ's Order should be affirmed, as she sustained a compensable work-related injury.

The sole issue for the Board's review is: Did claimant's injury arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Respondent is the business office for services provided to nursing homes, and claimant was employed as a medical transcriptionist beginning March 18, 2013. In this position, claimant would use the computer to transcribe dictation for physician assistants.

On September 3, 2013, claimant testified she worked a 10-hour day, as it was very busy. Claimant testified her shift included "a lot of moving around, a lot of printing, reaching on the printer, filling up the printer with more paper, a lot of up and down."² By the time she left for home, claimant stated her back was sore. She went home and self-medicated with ibuprofen and a heating pad, which relieved her pain.

The next day, September 4, 2013, claimant returned to work, and her back pain returned and became progressively worse throughout the day. Claimant informed Sundra Williams, an LPN at the office, around midmorning that her back was aching. Claimant then left for lunch and made a delivery to a home before returning to the office. By approximately 3:00 p.m., claimant's back pain had worsened. Claimant asked respondent's medical director, Dr. Gregory Lakin, if she could leave the office due to her back pain. Her request was granted.

When claimant returned to her computer to prepare to leave for the day, she suffered a stabbing pain to her back as she started to sit. She testified:

² P.H. Trans. at 6.

I went to go sit down at my computer to turn everything off and leave for the day. And when I went to sit is when I got a stabbing pain in my back. And I couldn't complete the motion to sit. It stopped me. And so I kind of tried to stand back up. And I couldn't stand fully erect, had to lean over on the desk to hold my upper body up. And I called for somebody and Dr. Lakin and Sundra both came in and tried to help me and move me over to a place where I could kind of sit down and tried to relieve the pain.³

Dr. Larkin testified he performed a check of claimant's back while in the office, including questioning claimant regarding the pain location:

Again, I asked her, you know, do you – where's your pain focused at, where is it tender, where does it hurt. As she was standing, I was palpating down her back, lower lumbar region was tight and it was tender. And that was the extent of it.⁴

Dr. Lakin then provided an injection to claimant's back which did not provide relief. EMS was called at claimant's request, and she was transported to Wesley Medical Center where she remained for two days. Claimant reported she "does occasionally get the back pain like this, but again it is normally relieved with the ibuprofen and heating pad."⁵ Claimant indicated she had never experienced pain that severe before the incident. Claimant was diagnosed with intractable back pain and treated with medication and physical therapy. An x-ray of the lumbar spine taken September 4, 2013, revealed no acute fracture or dislocation of the lumbar spine and grade 1 anterolisthesis of L5 on S1. An MRI of the lumbar spine taken the following day revealed mild degenerative changes most prominent at L3-4 and L5-S1, and no fracture or dislocation of the lumbar spine. Claimant was released when she could ambulate.

Claimant began treatment with Drs. Moore and Simon, including medication and physical therapy. She also continued receiving chiropractic treatments for her back, a practice she has maintained since at least 2006. Claimant testified she had routine chiropractic adjustments, but not for the back and hip pain. Claimant had received chiropractic treatments in 2013 prior to the incident of September 4, 2013, and treated again on September 9, 2013.⁶

³ *Id.* at 10.

⁴ *Id.* at 29.

⁵ P.H. Trans., Cl. Ex. 1 at 10.

⁶ Claimant testified she went to Hancock Chiropractic for chiropractic treatment on September 9, 2013. Respondent's counsel indicated the notes from Dr. Hancock show claimant treated on Wednesday, September 11, 2013. Claimant stated she believed the notes were incorrect.

Dr. Lakin testified claimant had a history of developing physical symptoms in times of work-related stress. He explained he believed claimant's symptoms were amplified by anxiety, and September 2013 was a stressful time at the office. Dr. Lakin stated he was in the midst of investigating the extent of a work-related problem involving claimant at the time of her accident. Dr. Lakin testified claimant had misled and lied to him repeatedly during her employment with respondent.

Dr. Pedro A. Murati, a board certified independent medical examiner, evaluated claimant at her counsel's request on October 15, 2013. Claimant complained of low back pain, the inability to bend her head down completely, the inability to lift or straighten her legs in front of her, the inability to sit for long periods of time due to low back pain, and numbness and tingling in both legs after standing, worse on the left. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy and bilateral SI joint dysfunction. Dr. Murati imposed temporary restrictions and recommended claimant receive epidural injections, physical therapy, and chronic pain management. Dr. Murati opined:

She has significant clinical findings that have given her diagnoses consistent with her described multiple repetitive traumas at work. . . . This claimant apparently sustained a structural injury to her low back which resulted in pain necessitating treatment. Therefore, it is under all reasonable medical certainty and probability the prevailing factor in the development of her conditions is the multiple repetitive traumas at work.⁷

Claimant was terminated by respondent and is now employed as a nuclear technician for Cardiovascular Consultants of Kansas.

Dr. Edward J. Prostic, a board certified orthopedic surgeon, examined claimant on December 20, 2013, at the request of the ALJ. Claimant presented with pain in the center and left side of the low back with some radiation to the posterior knee and some numbness and tingling intermittently about the left thigh. Claimant complained of difficulties upon awakening and worsened pain by sitting, standing, walking, bending, squatting, twisting, lifting, pushing, and pulling. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Prostic reported:

On or about September 3, 2013, [claimant] sustained injury to her low back during the course of her employment. Though her mechanism of injury was not forceful, it is superimposed upon a lady who is significantly overweight and most likely significantly deconditioned. The prolonged sitting made her more vulnerable to a low back sprain and strain. At the present time, there is no evidence of nerve injury. Appropriate treatment is anti-inflammatory and/or analgesic medicines and a therapeutic exercise program. The patient is encouraged to lose weight and get

⁷ P.H. Trans., Cl. Ex. 1 at 4.

into aerobic fitness. The work performed on or about September 3, 2013 while employed by [respondent] is the prevailing factor in the injury, the medical condition, and the need for medical treatment.⁸

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b states, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 states, in part:

(c)(3)(D) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

⁸ Prostic Report (Dec. 20, 2013) at 2-3.

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁰

ANALYSIS

The undersigned adopts the findings of fact and conclusions of law contained in the ALJ's order of April 11, 2014. The causation and treatment opinions provided by Dr. Murati are uncontroverted. The causation opinion provided by Dr. Prostic is also uncontroverted. Both Dr. Murati and Dr. Prostic related claimant's low back condition to her work activities.

⁹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁰ K.S.A. 2012 Supp. 44-555c(k).

Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.¹¹

Respondent, on cross-examination of claimant, raises the issue of claimant's preexisting low back condition, the existence of which could trigger the application of K.S.A. 2013 Supp. 44-508(f)(2), which states:

An injury is compensable only if it arises out of and in the course of employment.
An injury is not compensable because work was a triggering or precipitating factor.
An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

No evidence was placed in the record to support the allegation that the work activities solely aggravated a preexisting condition or rendered a preexisting condition symptomatic. As such, K.S.A. 2013 Supp. 44-508(f)(2) does not apply at this point in the proceeding.

CONCLUSION

Claimant has met the burden of proving she suffered an injury arising out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary Jones dated April 11, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2014.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

¹¹ See *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

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